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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1976

No. A-276.

76-740**ANNA F. DITSON, TRUSTEE,
APPELLANT,***v.***CITY OF BOSTON,
APPELLEE.**ON APPEAL FROM THE APPEALS COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.**Statement of Jurisdiction.**

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Supreme Court of the United States.

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No. A-276.

ANNA F. DITSON, TRUSTEE,
APPELLANT,
v.

CITY OF BOSTON,
APPELLEE.

ON APPEAL FROM THE APPEALS COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

Statement of Jurisdiction.

Appellant appeals from the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts entered in this action on June 29, 1976 denying a Petition for Further Appellate Review of the Appeals Court decision sustaining the Land Court decree foreclosing the appellant's right of redemption from the tax lien on her home (Appendix D, B).

A final decree was entered in the Land Court for the Commonwealth on July 26, 1976 pursuant to the Supreme Judicial Court's denial of review (Appendix E).

This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below.

The opinion of the Land Court of the Commonwealth of Massachusetts is unreported and is reproduced in Appendix B. The opinion of the Appeals Court of Massachusetts is reported as *Boston v. Ditson*, Mass. App. Ct. Adv. Sh. (1976) 613, 348 N.E. 2d 116, and is reproduced in Appendix C. The denial of the Petition for Further Appellate Review is set forth in Appendix D and the Final Decree of the Land Court for the Commonwealth is set forth as Appendix E.

Jurisdiction.

Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(2), this being an appeal which draws into question the validity of Massachusetts G.L. c. 148, § 5 (*infra* pp. 4-5), on the ground that it is repugnant to the Constitution of the United States.

The Land Court of the Commonwealth of Massachusetts entered a decree foreclosing the appellant's right of redemption of her property on June 3, 1974. An appeal was taken to the Appeals Court of the Commonwealth of Massachusetts which upheld the decree of the Land Court on May 28, 1976.

A Petition for Further Appellate Review was filed with the Supreme Judicial Court and was denied on June 29, 1976.

Timely notice of appeal to the United States Supreme Court was filed in the Land Court of the Commonwealth of Massachusetts on September 27, 1976. Pursuant to

Rule 13 of the Rules of the Supreme Court of the United States, the time for the appellant to docket her case was enlarged to and including November 26, 1976.

In the event that this Court does not consider appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for Writ of Certiorari pursuant to 28 U.S.C. § 2103.

Constitutional and Statutory Provisions Involved.

This case involves the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States:

UNITED STATES CONSTITUTION.

AMENDMENT IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Massachusetts G.L. c. 148, § 5, is reproduced below:

"The marshal, the head of the fire department or any person to whom the marshal or the head of the fire department may delegate his authority in writing, may, and upon complaint of a person having an interest in any building or premises or property adjacent thereto, shall, at any reasonable hour, enter into buildings and upon premises, which term for the purposes of the remainder of this section shall include alleys adjacent thereto, within their jurisdiction and make an investigation as to the existence of conditions likely to cause fire. They shall, in writing, order such conditions to be remedied, and whenever such officers or persons find in any building or upon any premises any accumulation of combustible rubbish, including waste paper, rags, cardboard, string, packing material, sawdust, shavings, sticks, waste leather or rubber, broken boxes or barrels or other refuse that is or may become dangerous as a fire menace or as an obstacle to easy ingress into or egress from such buildings or premises, they shall, in writing, order the same to be removed or

such conditions to be remedied. Notice of such order shall be served upon the owner, occupant or his authorized agent by a member of the fire or police department. *If said order is not complied with within twenty-four hours, the person making such order, or any person designated by him, may enter into such building or upon such premises and remove such rubbish or abate such conditions at the expense of such owner or occupant.* Any expense so incurred by or on behalf of the commonwealth or of any city or town, shall be a lien upon such building or premises, effective upon the filing in the proper registry of deeds of a claim thereof signed by such person and setting forth the amount for which the lien is claimed; and the lien shall be enforced within the time and in the manner provided for the collection of taxes upon real estate. Any such owner or occupant who fails or refuses to comply with said order shall be punished by a fine of not more than fifty dollars for each consecutive forty-eight hours during which such failure or refusal to comply continues" (emphasis supplied).

Questions Presented.

The following questions are presented by this appeal:

1. Whether the lien for expenses incurred by the City of Boston acting under G.L. c. 148, § 5, in the removal of personal property from Mrs. Ditson's home was valid although the entry into the dwelling and the inspection thereof constituted an illegal search and whether the assessment made for the rubbish removal was so tainted by the illegal entry that it vitiated in its entirety the tax lien account of which it was the major item.

2. Whether the abatement notice served upon Anna F. Ditson, Trustee, denied her due process of law in that (1) such notice did not give a reasonable period of time within which to abate the described condition, (2) such notice, while indicating a fine for failure to take action, did not inform Anna F. Ditson, Trustee, that the city would forcibly remove such accumulations from her house without any prior judicial review or warrant, and (3) such notice was insufficient to adequately warn her of the nature of the proceedings, the city having prior knowledge of her mental limitations.

Statement of the Case.

RELEVANT FACTS AND PROCEEDINGS BELOW.

The Statement of Facts contained in the Appeals Court decision Appendix C (pp. 36-39) and the Land Court decision Appendix B (pp. 19-30) are adopted.

On July 24, 1969 an abatement order, issued by an official of the Boston Fire Department pursuant to G.L. c. 148, § 5, was served upon the appellant. Said order directed the appellant to remove certain accumulations of rubbish in her house by noon of the following day. At 3:00 p.m. the next day, certain members of the fire department forcibly broke down the front door and discovered an accumulation of items. The Appeals Court found, "So far as appears on the present record, they did so purely on the strength of the abatement order and the provisions of G.L. c. 148, § 5, and not pursuant to a search warrant" (Appeals Court, p. 38). An independent contractor, retained by the city, spent three weeks removing the personal property and papers. "The respondent was not allowed on the locus while the cleaning operations were taking place except when accompanied by a member of the department" (Appeals Court, p. 38).

Massachusetts G.L. c. 148, § 5, provides that charges become a lien on property enforced at the same time and in the same manner provided for in the collection of real estate taxes. The independent contractor charged \$11,927.15, which amount was entered on the tax title account on May 8, 1970. The locus at 171 Marlborough Street was taken by the city of Boston for non-payment of the 1969 real estate taxes assessed thereon, together with the sewer and water charges and interest, by an instrument of taking recorded on May 7, 1970. The petition to foreclose was brought on May 10, 1972. Five days later, the appellant paid all but one dollar of the 1969 bill.

At the time of the appellant's payment, the real estate tax assessed on the locus for 1970 had been added to the account. Although Mrs. Ditson was not allowed on the property, real estate taxes for 1971 and 1972 were added. The taxes for those three years were never at issue. The appellant's attack below was confined to two items of expense incurred by the city in connection with the locus that were added to the tax title account: (1) a charge of \$11,927.15 for the removal of rubbish from the locus in 1969 and (2) a charge of \$7,880 for repairing and boarding up the house at 171 Marlborough Street after it had been damaged by fire in 1971.

On October 20, 1976, the city of Boston, after having received notice of Mrs. Ditson's appeal to the United States Supreme Court, sold her home located at 171 Marlborough Street, Boston at public auction to the highest bidder for \$40,000 plus pro rata taxes of \$8,000.

HOW THE FEDERAL QUESTION WAS PRESENTED BELOW.

On June 14, 1973, Douglas A. Randall, attorney for the appellant, filed a "Suggestion of Mental Incompe-

tence" and was appointed guardian ad litem by the Land Court. An amended answer attacking the validity of the tax title and the underlying procedures was filed with no objection by the city of Boston. The amended answer alleged that the lien of \$11,927.15 which was added to the tax title account for the removal of rubbish under the provisions of G.L. c. 148, § 5, was in violation of the Fourth Amendment to the United States Constitution in that it arose out of a warrantless forcible entry into a private dwelling.

The amended answer further alleged that the procedures followed by the fire department of the city of Boston in ordering that all accumulations be removed within 24 hours, and the failure of the order to inform the appellant of the power of the fire officials to summarily enter her house to effect that removal, all pursuant to G.L. c. 148, § 5, resulted in the deprivation of the appellant's property without due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution.

The Land Court rejected the constitutional arguments of the appellant and entered a decree foreclosing the right of redemption of the appellant in her property (June 3, 1974).

An appeal was taken to the Appeals Court of the Commonwealth of Massachusetts setting forth the same constitutional objections. The court determined that the notice received by the appellant satisfied due process requirements, but found the entry into the appellant's home pursuant to G.L. c. 148, § 5, constituted an illegal search per *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 534 (1967). "The present case does not fit within any exception to the warrant requirement for administrative searches" (Appeals Court, p. 41).

Despite the finding that such entry violated the Fourth Amendment of the United States Constitution, the Appeals Court upheld the enforceability of the clean-up lien in the tax account. The Court cited the case of *United States v. Calandra*, 414 U.S. 338 (1974), in applying a balancing test to determine whether the remedy requested by the appellant was required by the Fourth Amendment.

"Our attention has not been directed to any pattern of illegal entries by fire officials in the exercise of their duties under G.L. c. 148, s. 5. We have every reason to believe that the effect of our holding, that a nonconsensual search pursuant to that section in other than exigent circumstances requires a search warrant, will be that fire officials will, in the future, procure such warrants" (Appeals Court, p. 50).

The court further referred to the harm that would result to the city from the voiding of this item in the tax title account. Placing emphasis on that harm, the Court decided that the Fourth Amendment did not require the voiding of this item.

Pursuant to Mass. R. App. P., Rule 27.1, a timely Petition for Further Appellate Review was filed with the Supreme Judicial Court of the Commonwealth of Massachusetts. Said petition was denied (without opinion) on June 29, 1976.

The Questions Are Substantial.

This application asks the Court to review the procedure for administrative searches for fire hazards, the right of an individual to be free from unreasonable intrusions, and the remedies for unconstitutional action. Specifically, the Court is asked to consider the effect of a violation of constitutional rights guaranteed under the Fourth

Amendment upon a tax title account, the major item representing reimbursement to the city for its expenses in the clean up of accumulations on the appellant's property. Due to the application of the "balancing test" of *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974), a determination must be made as to what interests of justice arise with respect to procedures applicable to searches and seizures of residential and personal property.

The Appeals Court of the Commonwealth, in a misapplication of the above test, determined that expenses incurred in the clean up of the property was valid although the entry onto the premises and the inspection thereof constituted an illegal search. The decision upholding the lien and the subsequent proceedings leading to the foreclosure of Mrs. Ditson's right of redemption of that lien has left Mrs. Ditson, an elderly lady living on social security, without an effective remedy to recover her home or secure damages for the unconstitutional invasion of her home.

DUE PROCESS ISSUE.

The abatement order (Appendix A, p. 18) nailed to the door of Mrs. Ditson's house and served upon her while visiting her daughter was not sufficient to satisfy the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution as fire department officials for the city of Boston were aware that they were dealing with a person with certain characteristics which would affect her ability to comply with the order of abatement (Land Court decision, p. 27). City Fire Department officials knew Mrs. Ditson was an elderly woman who would have difficulty meeting the 24 hour deadline. The order required the performance of

\$11,000 worth of work within the 24 hour period (Appeals Court, p. 39). The city of Boston with its manpower and financial resources required three weeks to remove the same accumulations. Due process is not achieved when a person is ordered to do what is impossible. Strict compliance with a state statute does not necessarily satisfy due process. *Robinson v. Hanrahan*, 409 U.S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972).

The hazard prompting the abatement order had been known to the fire officials involved for seven years (Appeals Court decision, p. 37). The Appeals Court determined that there was not an imminent and substantial threat to the life, health, safety or security of the residents of the city (Appeals Court decision, p. 42). The fire chief for the city characterized the accumulations (Land Court decision, p. 30) as no different, though in considerable mass and disarray, than those that would be found in any home.

The notice served by the city of Boston failed to apprise Mrs. Ditson of the consequences of her inaction. The penalty provision of G.L. c. 148, § 5, provided, inter alia, for a fine of \$50 for each consecutive 48 hour period of refusal. Given this alternative, the city, in an exercise of arbitrary power, chose a method which was out of proportion to the immediacy of the problem.

FOURTH AMENDMENT ISSUE.

The Appeals Court of the Commonwealth of Massachusetts was aware of the holding in *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 534, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), which made clear that an administrative inspector may enter private premises without consent only after obtaining a search warrant. Accordingly, the Appeals Court deter-

mined that the entry into the home of Mrs. Ditson and the inspection thereof constituted an illegal search which could not be classified as insubstantial (Appeals Court decision, p. 43). The Court, however, failed to apply the remedy found in *Camara* as, in its opinion, liability in this situation was compensatory, not criminal. The Appeals Court viewed the *Camara* remedy as limited to a prohibition against criminal prosecution for the assertion of constitutional rights.

The Appeals Court failed to understand the reasoning of *Camara* which hinged not on the potential sanction (whether criminal or civil), but rather upon the extent of the intrusion.

"It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. . . . even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security," 387 U.S. 523, 530 (1967).

The overriding function of the Fourth Amendment is to protect personal privacy and dignity. In any reconciliation requiring an assessment of weight be accorded competing interests, the home should be accorded the full range of Fourth Amendment protections. *Lewis v. United States*, 385 U.S. 206, 87 S. Ct. 424, 17 L. Ed. 2d 312 (1966), rehearing denied, 386 U.S. 939, 87 S. Ct. 951, 17 L. Ed. 2d 811 (1967).

Mr. Justice Stewart in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), stated:

"In times not altogether unlike our own, [the authors of the Constitution] won — by legal and constitutional means in England, and by revolution on this continent — a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." *Id.* at 455. (Footnotes omitted.)

The Appeals Court attempted to apply the so-called "balancing test" of *Calandra* in order to determine whether the Fourth Amendment required the remedy the appellant now seeks. The rationale behind *Calandra* would not be applicable in this case. The balancing test of *Calandra* was devised to protect the unique power and function of the grand jury. The ability of a defendant in a criminal trial to safeguard his constitutional rights was not impeded or altered in any way by *Calandra*. This "second chance" aspect of *Calandra* is not available to Mrs. Ditson.

The Appeals Court in attempting to apply the test failed to give proper weight to the substantiality of the intrusion on a justifiable expectation of privacy. The chopping down of a front door in the middle of an urban neighborhood is the type intrusion to a citizen's personal dignity and privacy that the Fourth Amendment was drawn to protect. The forcible entry during Mrs. Ditson's known absence and the inspection, classification and removal of her personal papers and property was the type search the framers of the bill of rights expected the judicial system to supervise. The Appeals Court further erred in its reliance upon *State Forester v. Umpqua River Navigation Co.*, 258 Ore. 10 (1971), cert. denied

404 U.S. 826 (1971), as, in that situation, there was a question whether an enclave of privacy was, in fact, penetrated.

Stress has been placed on the lack of known patterns of illegal searches by the fire department of Boston. Due process, however, is guaranteed by the Fifth and Fourteenth Amendments to all litigants and no pattern of illegality need be shown to raise the issue of its deprivation. Where the government can achieve a result equally well by according due process as by denying it, the former course of action must be followed. *Raper v. Lucey*, 488 F. 2d 748 (1st Cir. 1973).

Deterrence is not the only justification for the exclusionary rule. The use of the term "prime purpose" (*Calandra*, 414 U.S. 339, 347) imports a recognition of other purposes served by the rule. Justice Brennan (*Calandra*, 414 U.S. 338, 357) has asserted that the framers of the exclusionary rule had uppermost in their minds not its deterrent effect, but the need to assure "the people — all potential victims of unlawful government conduct — that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."

The search of Mrs. Ditson's house was not a health inspection nor a part of a systematic area inspection. It was an intimate and personal search which consumed three weeks. The city of Boston seeks to use the results of its illegal search and the resultant lien for a general state purpose which is analogous to the objective sought by a criminal conviction. The protection afforded to citizens by the United States Constitution should not depend upon the sanction sought by the state. The alleged conduct or omissions of the appellant relied upon for civil recovery here could have supported (without any

substantial change in allegation or proof) a criminal charge. Government officials should not be able to deny citizens their constitutional protections by deciding whether to proceed criminally or civilly.

The Appeals Court (Appeals Court decision, pp. 48, 50) attempted to justify its classification of defendants (civil or criminal) by stating that typically those individuals on the civil side, by their wealth and social position are able to pursue civil remedies in court or present effective complaints to state agencies. This same rationale would lead one to believe that rich, respectable criminals are not entitled to constitutional protections because of their economic status. The rationale that protection is not needed by defendants of wealth and high social or economic position is not supported by any decision of this Court. In any event, the appellant here is not an individual of wealth or high social position.

In *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886), this Court stated:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." 116 U.S. 616, 635.

There are no other adequate remedies available to the appellant. Compensatory damages for tortious invasion of privacy were not available in Massachusetts until 1974

(Massachusetts G.L. c. 214, § 1B, inserted St. 1974, c. 193, § 1). A determination that the municipal lien was obtained in an illegal manner will result in no "windfall" (Appeals Court decision, p. 50) to Mrs. Ditson; she will only enjoy the continued use of her home. The city will suffer an appropriate penalty for the violation of a citizen's rights. Mrs. Ditson desires to "mend no one's privacy [but her] own." *Gelbard v. United States*, 408 U.S. 41, 63, 92 S. Ct. 2357, 33 L. Ed. 2d 179 (1972).

The violation by the city fire officials was substantial, gross, willfull and prejudicial. The Court should consider the fact that there were no administrative sanctions imposed against persons involved in the illegal search. Regardless of the good faith of the individual officers, the extent and duration of the search was the type the Constitution protects the people from.

The assistant city treasurer testified that the reason for the immediate action on this particular account was probably the desire of the city to "stay on top" of large accounts. Since the portion of the lien derived from the real estate tax was small, the speed with which the city moved on this tax title was primarily due to the \$11,927.15 lien created by the illegal entry. The city of Boston's action for foreclosure had its beginnings in the invasion of Mrs. Ditson's constitutional rights.

By electing to file a civil proceeding for the expense of abating the condition, the city of Boston deprived Mrs. Ditson of her home by using the same evidence which it could not have used in a criminal proceeding. If Mrs. Ditson had, in fact, faced a criminal complaint, the penalty would not be as severe as the loss of her home.

To allow the Massachusetts courts to follow the ruling in this case is to reduce the constitutional protection

afforded Mr. Camara to mere lip service as applied to Mrs. Ditson where she was unable to physically prevent the warrant-less invasion of her home.

Respectfully submitted,

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Appendix A.

BOSTON FIRE DEPARTMENT
FIRE PREVENTION DIVISION
115 SOUTHAMPTON STREET
ABATEMENT ORDER

Date July 23, 1969

Anna F. Ditson, Trustee
R.F.D. #2, Woodsville, New Hampshire

Inspection of the premises located at 171 Marlboro Street, Boston, Massachusetts, reveals violation of fire laws herein specified:

Boston Fire Prevention Code, Section
Fire Prevention Law, Chapter 148, Section 5
Board of Fire Prevention Regulations Governing

Rule

You are hereby ordered to abate or correct the conditions enumerated below as directed on or before Noon on Friday, July 25, 1969.

ORDERED: all accumulations of rubbish and refuse obstructing easy ingress into or egress from building at 171 Marlboro Street, Boston, and all accumulations of combustible rubbish and refuse within said building be removed before the hour and day aforesaid.

Per Order:

/s/ Joseph F. Kilduff
Chief of Department

This notice served on Anna F. Ditson, Trustee, in hand at 86 Mt. Vernon St., Somerville, Massachusetts on or about 8:25 A.M. on Thursday, July 24, 1969, and by posting on front door of said 171 Marlboro St. on or about 4:10 P.M. on Wednesday, July 23, 1969.

By Vincent A. Bolger, District Fire Chief, July 24, 1969

Appendix B.

COMMONWEALTH OF MASSACHUSETTS
LAND COURT

Suffolk, ss.

Tax Lien

Case No. 47283

City of Boston,
Petitioner

vs.

Anna F. Ditson, Trustee,
Respondent

D E C I S I O N

This is a Petition to Foreclose Tax Lien on land taken on May 7, 1970 for nonpayment of taxes in accordance with an instrument dated and duly recorded on May 7, 1970 in Book 8362, Page 454. The land taken for taxes was described as:

“Land, with the buildings thereon, on the northwesternly side of Marlborough Street, numbered one hundred seventy one (171) in the numbering of said Marlborough Street, between an estate now or formerly of Margaret D. Bottomly (numbered 169) and an estate now or formerly of John J. Carney et al Trustees (numbered 173) and supposed to contain about twenty nine hundred twelve (2912) square feet. Said land is situated in Block 11 Section 1, in the City District shown on the Boston Assessors’ Plans of said City, filed in the office of the Board of Assessors.”

On June 14, 1973, Douglas A. Randall, attorney for Anna F. Ditson, filed a "Suggestion of Mental Incompetence," which alleged that Anna F. Ditson lacked the mental capacity to fully understand the nature of the proceedings against her and requested the Court to appoint a Guardian Ad Litem to protect her interests. At a hearing on this motion, Anna F. Ditson testified that she would like the Court to appoint a Guardian Ad Litem and Attorney Kevin M. Burke, representing the City of Boston, stated that the City would be amenable to the appointment of such a guardian. After fully explaining the proceedings to Mrs. Ditson, the Court appointed Attorney Douglas A. Randall as her Guardian Ad Litem. Mr. Randall then filed a Motion to Amend the Answer of Anna F. Ditson, to which the City did not object, and which the Court allowed.

The Amended Answer of the Guardian Ad Litem attacked the validity of the tax title and the underlying procedures on the following grounds:

"1. The 1969 assessment was not made upon the owner thereof or set forth in G.L. c. 59, s. 11 but was made against Anna F. Ditson, Trustee, when in fact Anna F. Ditson was not a trustee, the trust instrument under which she held prior ownership having expired by the limitation of twenty years contained therein.

2. The tax title was based upon an instrument of taking dated May 7, 1970 predicated upon the unpaid real estate taxes assessed upon the subject property as of January 1, 1969 to Anna F. Ditson, Trustee. In due course, the unpaid taxes for the year 1969 became a tax title account of the City of Boston on May 7, 1970 with sewer, water, costs and interest

totaling \$2,809.10. On the following day, May 8, 1970, there was added to the tax title account a lien in the amount of \$11,927.15 allegedly for the removal of rubbish under the provisions of G.L. c. 148, s. 5. It is alleged that the provisions of G.L. c. 148, s. 5 are in violation of the United States Constitution, Articles of Amendment 4 guaranteeing 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' It is further alleged that the provisions of G.L. c. 148, s. 5 are in violation of Amendment 14 of the United States Constitution in that said law deprives the respondent of liberty and property without due process of law and denies her the equal protection of the laws. It is further alleged that the procedures followed by the Fire Department of the City of Boston in purporting to act under said G.L. c. 148, s. 5 wherein on July 23, 1969 an abatement order was entered by Chief Joseph F. Kilduff of the Fire Department, which was served upon the person of Anna F. Ditson the following morning requiring the removal of alleged rubbish from her home at 171 Marlborough Street within 24 hours was so peremptory and impossible of accomplishment (the actual removal by the city's agent took several weeks) so as to lack due process; the forcible entry into the locus which was the home of Anna F. Ditson by the forcible removal of the front door without warrant or application for the same or court order or proceeding of any nature violated the requirements of the

4th Amendment to the United States Constitution guaranteeing to people the right to be secure against searches and seizures without warrants.

3. The abatement order served upon Anna F. Ditson in no way fairly warned her that her failure to comply with the peremptory order for removal of said rubbish would in fact allow officials of the City of Boston or their agents to summarily enter her home and remove without prior adjudication any and all material adjudged by the city officials to fall within their personal opinion of which constituted rubbish; that the assessment of the cost of said removal might be several thousand dollars and in fact would be in excess of \$11,000 all without the issuance of any warrants or any prior judicial determination of the right of Anna F. Ditson to be secure in the possession of her home, papers and effects as guaranteed by the 4th and 14th Amendments to the United States Constitution.

4. On and after the 8th of May, 1970 the tax title account contained this unlawful and unconstitutional item of \$11,927.15. The said Anna F. Ditson, although possessed of sufficient funds to pay the tax liability, if valid, did not have sufficient funds to pay the \$11,927.15 item and, therefore, was wrongfully subjected to the loss of her property by the wrongful demands of this latter amount. The unpaid real estate taxes assessed against Anna F. Ditson, Trustee, for January 1, 1970, 1971 and 1972 in each case assessed to Anna F. Ditson, Trustee, were subsequently added to the tax title account. On May 15, 1972 after being notified of the possible foreclosure of the outstanding tax lien, Anna F. Ditson went to City Hall in order to pay the 1969 taxes which were

the basis of said tax lien and, although she tended the full payment of the original tax, other charges, costs and interest, was informed that she could not pay the entire balance due but must leave a balance of \$1.00 in order to protect the spurious lien previously committed under the authority of G.L. c. 148, s. 5 as aforesaid, hence depriving her of due process of law guaranteed to her under the 14th Amendment of the United States Constitution.

5. Since the petition for foreclosure of the tax lien was filed in the Land Court, there was added to the tax title account a lien originally in the amount of \$7,880.00 allegedly pursuant to the authority granted to the Building Commissioner of the City of Boston under the authority of sec. 116 of the Boston Building Code (S.T. 1938, c. 479) and amendments thereto (S.T. 1939, c. 217). The authority for such a lien expired by virtue of the adoption on July 1, 1970 of a new building code of the City of Boston wherein such authority was not carried forth. It is alleged that said claim or lien is invalid thereby, its statutory basis having been superseded and/or repealed.

6. The wrongful demand of payment of a tax lien even if valid as assessed against Anna F. Ditson, Trustee, is invalid when it includes liens in excess of \$20,000 invalid by law and in excess of the value of the actual services rendered to the property and the deprivation of opportunity for the landowner to contest the reasonableness of said charges.

7. That the said Anna F. Ditson was of insufficient mental capacity so as to understand the nature of the notices sent by the city concerning the unpaid taxes, the fire department and building department

liens and that this lack of mental capacity was well known to the officials of the City of Boston and that these proceedings violate due process due to the lack of mental capacity of Anna F. Ditson to understand the nature of the proceedings and the failure of the petitioner to seek the appointment of a guardian ad litem in each of the several procedures and in the instant proceeding."

A hearing was held at the Land Court in Boston on June 14, July 10, October 23 and October 26, 1973. A stenographer was appointed to record the testimony. All exhibits introduced into evidence are incorporated herein for the purpose of any appeal.

There was testimony for petitioner from James J. Cunningham, Assistant Treasurer of the City, Vincent A. Bolger, District Fire Chief, Eleanor McDermott, Senior Administrative Assistant in the Boston Building Department and William J. Reardon, Fire Inspector for the Fire Prevention Division of the Boston Fire Department. Respondent testified in her own behalf as did her neighbors Robert Emmett Jones and William R. Smith.

There are three questions to be resolved, namely, the validity of the tax assessment on respondent for the year 1969 and thereafter; the validity of the addition of charges for removal of rubbish in 1969 to the tax lien; and finally, the validity of the addition of charges for the repairs to the building after a fire in 1971 to the tax lien.

I. The Validity of the Tax Assessment for the Year 1969.

The Court finds that the tax for 1969 was assessed upon the property located at 171 Marlborough Street in Boston to one Anna F. Ditson, Trustee and that on May 7, 1970, the taxes being then unpaid, the property was taken by

the City of Boston under the provisions of General Laws, Chapter 60, Section 54. On that date the amount due was \$2809.10 for real estate taxes, sewer, water costs and interest. The real estate tax for the year 1970 in the amount of \$2928.10 was entered on the tax title record on February 2, 1971; taxes for 1971 in the amount of \$3336.28 were entered on the tax title record on May 26, 1972; and taxes for 1972 in the amount of \$3651.10 were entered on January 17, 1973. On May 15, 1972 the respondent paid the entire 1969 unpaid bill for real estate taxes, water, sewer charges and interest minus \$1.00. There was testimony and the Court finds that the petitioner City had a custom and practice to leave a \$1.00 balance on such a tax account in order to protect the City's lien for other late charges posted after the original tax charge.

Anna F. Ditson owned the premises at 171 Marlborough Street which she conveyed to one Anthony J. DeLeo who by deed of even date June 1, 1949, recorded in Suffolk County Registry of Deeds, Book 6523, Page 139 [Exhibit No. 3] reconveyed the same to her as trustee for the benefit of her son George Fedorov Ditson. Under paragraph 5 of the trust as recited in said deed, the trust was to continue for a term of twenty (20) years. Thus the trust should have terminated on May 31, 1969. Under the provisions of paragraph 22 of said trust, upon termination the trust property was to be conveyed to the beneficiary or sold, with the powers of the trustee to continue for this purpose. Thus the tax was properly assessed to Anna F. Ditson, Trustee at least in the year 1969; in the succeeding years the trust had expired but Anna F. Ditson as trustee had not conveyed the property nor sold it and therefore her powers as trustee continued for this purpose. Indeed, even as of this date, the respondent has not conveyed the property to the ben-

eficiary. Thus the Court finds that the assessment of the taxes to "Anna F. Ditson, Trustee" for the years 1969, 1970, 1971, and 1972 was proper.

Even if, as the respondent argues, the trust instrument under which she held prior ownership had expired it does not follow that an assessment of taxes on Anna F. Ditson, Trustee is invalid. While General Laws, C. 59, § 11 requires that real estate taxes shall be assessed to the person who is the owner and the person appearing of record on January first of a given year, General Laws, C. 60, § 21 allows that where there is an error in the name of a person taxed, "the tax assessed to him may be collected of the person intended to be assessed . . ."

There is no difficulty in discerning that the person intended to be assessed is the respondent, Anna F. Ditson. The fact that there is a designation as trustee does not cloud the intent of the assessor. The failure of the assessors to describe the owner in a technically correct manner does not invalidate the assessment, and the Court so rules. *Trustees of Hawes Fund v. Boston*, 346 Mass. 26. Furthermore, since Anna F. Ditson did make tax payments against the tax assessed for 1969, it would seem that if there was an error in the naming of the assessed owner it was "neither substantial nor misleading" as required by General Laws, C. 60, § 37, and consequently, said error would not invalidate the tax title held by the City of Boston on the property at 171 Marlborough Street.

II. The Charge for Rubbish Removal in 1969.

William J. Reardon, Fire Inspector for the Fire Prevention Division of the Boston Fire Department, testified that he had received many complaints from 1962 to 1969 concerning rubbish and debris in the rear yard of 171 Marlborough Street and had visited the premises in his official capacity several times; that he had also received

complaints that the interior of the building contained rubbish and other debris, but could never gain access to inspect the house; that he spoke to Mrs. Ditson many times, and that she did not believe the material was rubbish, but described it as her "personal belongings"; that, in his opinion, Mrs. Ditson was "eccentric"; and that she did not respond to repeated requests to remove the debris over a seven year period from 1962 to 1969.

Photographs taken of the rear of 171 Marlborough Street on May 21, 1969 [Exhibit Nos. 11 and 12] show an automobile buried under boxes of debris. Further photographs taken July 23, 1969 and shortly thereafter, as the firemen sought to clear out the house, show an enormous accumulation of rubbish, packed so high it was difficult to pass through the premises. Exhibit No. 6 shows the exterior of the front door at 3:15 p.m. on July 22, 1969 with debris piled inside against the windows framing the front door. Exhibits Nos. 8, 9 and 10 are photographs showing 36 interior scenes of the premises after entry was made. Clearly, the premises resembled nothing except the legendary property of the "Collier Brothers."

General Laws, Chapter 148, Section 5 states:

"The marshal, the head of the fire department or any person to whom the marshal or the head of the fire department may delegate his authority in writing, may, and upon complaint of a person having an interest in any building or premises or property adjacent thereto, shall, at any reasonable hour, enter into buildings and upon premises, which term for the purposes of the remainder of this section shall include alleys adjacent thereto, within their jurisdiction and make an investigation as to the existence of conditions likely to cause fire. They shall, in writing, order such conditions to be remedied, and

whenever such officers or persons find in any building or upon any premises any accumulation of combustible rubbish, including waste paper, rags, cardboard, string, packing material, sawdust, shavings, sticks, waste leather or rubber, broken boxes or barrels of other refuse that is or may become dangerous as a fire menace or as an obstacle to easy ingress into or egress from such buildings or premises, they shall, in writing, order the same to be removed or such conditions to be remedied. Notice of such order shall be served upon the owner, occupant or his authorized agent by a member of the fire or police department. If said order is not complied with within twenty-four hours, the person making such order, or any person designated by him, may enter into such building or upon such premises and remove such rubbish or abate such condition at the expense of such owner or occupant. Any expense so incurred by or on behalf of the commonwealth or of any city or town, shall be a lien upon such building or premises, effective upon the filing in the proper registry of deeds of a claim thereof signed by such person and setting forth the amount for which the lien is claimed; and the lien shall be enforced within the time and in the manner provided for the collection of taxes upon real estate. Any such owner or occupant who fails or refuses to comply with said order shall be punished by a fine of not more than fifty dollars for each consecutive forty-eight hours during which such failure or refusal to comply continues."

It is pursuant to the above law that the City of Boston certified the rubbish removal charge to Mrs. Ditson's tax title account.

Vincent A. Bolger, District Fire Chief, testified that he served a notice on Mrs. Ditson on July 24, 1969, ordering her to remove rubbish and refuse on or before noon of the following day, July 25, 1969; that when no action was taken to abate the conditions, the fire department forcibly entered 171 Marlborough Street and supervised the removal of the rubbish by a private contractor; and that, as far as he knew, no warrant was sought and no court proceeding was commenced prior to the forcible entry of the house; Mrs. Ditson admitted being served with a paper (the abatement order) while at her daughter's home in Somerville by Mr. Kerr of the Boston Law Department and another at an early morning hour on July 24, 1969. She testified she was unable to do anything about clearing up the debris in 24 hours.

Exhibit No. 13 is a delegation of authority "to do and perform all and singular the acts and things" which the Chief of Department is empowered to do and perform under the provisions of Chapter 148, Sections 4 and 5, to, among others, District Fire Chiefs. This was dated March 5, 1969. An Abatement Order signed by Vincent A. Bolger, District Fire Chief, was issued July 23, 1969 against Anna F. Ditson, Trustee with her address listed as New Hampshire, ordering conditions abated by noon on Friday, July 25, 1969. Exhibit No. 5 is a photograph of the order served on Mrs. Ditson in the early morning of July 24, 1969 in Somerville and the Court so finds. The Court likewise finds that this order was not complied with and that as a result the fire department broke down the door to enter on July 25 at about 3:15 p.m., finding the shocking conditions as listed inside the premises.

The city then engaged the Clifford Construction Company to clean up the premises and men and equipment

were brought in for this purpose; that an item by item determination of what material was to be taken and what was to be left was made. Witness Bolger testified that he tried to preserve anything of value in furniture, but that he disposed of most of the broken pieces of furniture, rugs, papers, books (many of which were mildewed), and cardboard cartons; and that the premises were completely cleared of combustible material and secured for legal trespass in a little more than three weeks. The charge for the contractor amounted to \$11,927.15 which was entered on the tax title account on May 8, 1970. The respondent did not contest the reasonableness of the amount of the charge for removal.

Mrs. Ditson was not allowed on the premises during the time that the premises were being cleaned up except when accompanied by a member of the Fire Department. After the premises were cleaned she lived in an automobile parked in the rear of the premises and kept dogs in the premises as will appear more fully.

Based upon careful consideration of all of the evidence, the Court finds that the City of Boston has complied with all of the particulars of General Laws, Chapter 148, Section 5. The respondent argues that the City's actions under this law violate the Fourth and Fourteenth Amendments of the United States Constitution. The Court disagrees. It is within the power of the Legislature to draft those statutes necessary for the exercise of its police power, and it has frequently done so by expressly authorizing entry upon private land in aid of law enforcement. *Thurlow v. Crossman*, 336 Mass. 248. It is only necessary that any statute based on the police power be reasonable and not arbitrary and the methods used to achieve a certain end be consistent with the due process clause, and benefit the public generally and

not just a particular class, so as not to violate the equal protection clause of the Fourteenth Amendment. As demonstrated in *DiMaggio v. Mystic Building Wrecking Co., Inc.*, 340 Mass. 686, at 693, a person owning a building found to be in a dangerous condition by an agency of a municipality, "had reasonable ground to expect that public authorities soon might require its prompt rehabilitation or removal."

As to the respondent's argument that entry was made without her consent and without judicial warrant, the Court notes that the 1962 amendment to General Laws, Chapter 148, Section 5 struck out the last sentence, which read: "Neither this section nor section four shall authorize entry into a one-family or two-family dwelling without the consent of the occupant," thereby indicating the Legislature's intent that consent need not be obtained.

III. The Building Razing Charge

After the premises at 171 Marlborough Street had been cleaned up in the summer of 1969, Mrs. Ditson apparently lived in the car in the rear of the premises and occupied the premises if not for living purposes then for other reasons, among them as a place of abode for a varying number of dogs. Accumulations of debris again appeared in the rear of the premises and there was evidence from neighbors that some of this material found its way into the building.

Sometime in May 1971, Mrs. Ditson was brought to Boston Municipal Court on charges of cruelty to animals and was given a suspended sentence while she was living in and about the automobile in the rear of 171 Marlborough Street. In June 1971, there was a fire on the premises which largely destroyed it. After the fire there was evidence that a violation report on 171 Marlborough

Street was made out June 28, 1971 (Exhibit No. 36) and that a notice of this was sent to Anna F. Ditson on June 29, 1971. Mrs. Ditson testified to receiving a "piece of paper" from a city inspector ordering her to do something about the building following the fire. The Boston Building Department asked for emergency bids for repairs and the boarding up of the building following the fire. A contract for this work was awarded to J. P. Donahoe Construction Co., Inc. which bid \$7880. There was evidence that this was not the lowest bid, but that the Building Commissioner considered the low bid to be unrealistic and had been dissatisfied with work done previously by the low bidder. A contract for the work was signed July 29, 1971 (Exhibit No. 46) and on March 8, 1972, the Building Commissioner reported this work satisfactorily completed and a notice of completion of work and of account rendered was sent to Mrs. Ditson on April 14, 1972 (Exhibit No. 51). On June 22, 1972 a lien was placed on the property for \$7880 (Exhibit No. 53) from which no appeal was taken pursuant to Section 118 and 119 of the Boston Building Code.

The authority of the building commissioner of the City of Boston to order the repair and demolition of a building is found in St. 1938, C. 479, § 116(d) (Boston Building Code) which states in part:

"Every building . . . which is dangerous or unsafe shall be made safe or removed; or every such building shall be vacated forthwith on order of the commissioner, with the approval of the mayor. Such order shall be in writing and shall be addressed and delivered or mailed, postage prepaid, to the owner or tenant, if he is known and can be found, or otherwise by posting an attested copy of the order in a conspicuous place upon an external wall of the build-

ing, and shall state the condition under which the building may again be used or occupied . . . If in the opinion of the commissioner the public safety so requires the commissioner, with the approval of the mayor, may at once enter the building or other structure which he finds unsafe or dangerous, or land on which it stands . . . with such assistance as he may require, and make safe or remove said unsafe or dangerous building or other structure . . ."

It was by virtue of this authority that the Building Commissioner ordered repairs to the roof and the boarding up of 171 Marlborough Street. The respondent, when ordered to repair the building, was not without redress. "The jurisdiction [of the building commissioner] is subject . . . to statutory safeguards against its unreasonable exercise, designed to satisfy the requirements of due process." *DiMaggio v. Mystic Building Wrecking Co. Inc.*, *supra* at 692. St. 1938, C. 479, § 118(a) provides that "a person who has been ordered by the commissioner to incur expense may so appeal therefrom [to the Board of Appeals existing under § 117] within thirty days of the date of such order, except that, in case of a building or structure, which, in the opinion of the commissioner, is unsafe or dangerous, the commissioner may in his order limit the time for such appeal to a shorter period." Under § 119(f), a person aggrieved by a decision of the Board of Appeal may, within fifteen days after the filing of such decision in the office of the commissioner, bring a petition in the Supreme Judicial Court for a writ of certiorari to correct errors of law in such decision.

As was pointed out in *DiMaggio v. Mystic Building Wrecking Co. Inc.*, *supra* at 692, the administrative deter-

mination of the building commissioner, subject as it is to the provisions of §§ 118 and 119 of the Boston Building Code, cannot be the subject of collateral attack, and the person whose property is razed because it is dangerous to the public health and safety must show that his administrative remedies were availed of seasonably and exhausted.

There is no evidence that the respondent availed herself of the statutory remedies, and the Court therefore rules that the administrative determination of the building commissioner is not subject to collateral attack in this case.

General Laws, C. 148, § 5 provides that any expense incurred for the removal of rubbish and combustible materials shall be a lien upon such building or premises, effective upon filing in the proper registry of deeds; "and the lien shall be enforced within the time and in the manner provided for the collection of taxes upon real estate."

St. 1938, C. 479, § 116(e) states in part:

"A claim for the expense incurred by the commissioner under paragraph (d) shall constitute a debt due the City upon completion of the work and rendering to the owner of an account therefor . . . Said debt, together with interest thereon at the rate of six per cent per annum from the date upon which said debt became due, shall constitute a lien upon the real estate on which the expense was incurred . . ."

"The word 'taxes', . . . relating to collection by sale or taking of any parcel of land shall, so far as pertinent, include all taxes, assessments or portions thereof, rates and charges of every nature which constitute a lien . . . upon the annual tax bill of a municipality . . ."

General Laws, C. 60, § 43.

St. 1938, C. 479, § 116(f) states:

"The owner of the real estate to which a lien has attached, as provided in paragraph (e) within ninety days after the statement of said lien was filed in the registry of deeds or with said assistant recorder, as the case may be, may appeal to the municipal court of the City of Boston, which shall hear and determine after a hearing whether the amount of the claim is more than the amount actually expended to make safe or remove the building or structure, if amount is more, said court may reduce the amount of the claim to the amount so actually expended."

Again, the Court finds that the respondent did not pursue her statutory remedy, and rules that the commissioner's determination is not subject to collateral attack in this case.

The Court finds and rules that the Instrument of Taking, dated May 7, 1970, recorded in Book 8362, Page 454 of the Suffolk County Registry of Deeds against the property located at 171 Marlborough Street assessed to Anna F. Ditson, Trustee (Exhibit No. 1), contained all required information pursuant to General Laws, C. 60, § 54, and therefore is "prima facie evidence of all facts essential to the validity of the title . . ."

The Petition to Foreclose Tax Lien, brought pursuant to General Laws, C. 60, § 65, is allowed, and the Court rules that the petitioner is entitled to a decree which shall forever bar all rights of redemption in the locus described in the petition. General Laws, C. 60, § 69.

Decree accordingly.

/s/ William I. Randall
Judge

Dated: June 3, 1974

Appendix C.

COMMONWEALTH OF MASSACHUSETTS

S. 74-542

Appeals Court

CITY OF BOSTON *vs.* ANNA F. DITSON, individually and as trustee.

Suffolk. October 15, 1975. — May 28, 1976.

Present: Hale, C.J., Keville, & Armstrong, JJ.

*Constitutional Law, Inspection of property, Search and seizure.**Real Property, Inspection. Taxation, Real estate tax: taking.**Petition* filed in the Land Court on May 10, 1972. The case was heard by *Randall, J.**Douglas A. Randall* for Anna F. Ditson.*Mack K. Greenberg*, Assistant Corporation Counsel (*Herbert P. Gleason*, Corporation Counsel, & *Robert A. Coviello*, Assistant Corporation Counsel, with him) for the city of Boston.

HALE, C.J. This is an appeal by the respondent from a decree of the Land Court upon the city's petition to foreclose a tax title to a parcel of land in Boston (the locus). The locus was taken by the city for nonpayment of the 1969 real estate taxes assessed thereon, together with sewer and water charges and interest, under G. L. c. 60, § 54, by an instrument of taking recorded on May 7, 1970. The petition to foreclose was brought on May 10, 1972. Five days later the respondent paid all but \$1 of the 1969 bill.

At the time of the respondent's payment, the real estate tax assessed on the locus for 1970 had been added

to the account. Between that time and the entry of the decree appealed from, real estate taxes for 1971 and 1972 were added. The taxes for those three years, totalling \$9,915.48, are not at issue.¹ Rather, the respondent's attack is confined to two items of expense incurred by the city in connection with the locus and added to the respondent's tax title account: a charge of \$11,927.15 for the removal of rubbish from the locus in 1969, and a charge of \$7,880 for repairing and boarding up the house on the locus after it had been damaged by fire in 1971.

THE RUBBISH REMOVAL CHARGE

The facts relating to the rubbish removal charge, insofar as material to our disposition of this case, were found by the judge to be substantially as follows. From 1962 to 1969 the city's fire department received many complaints about accumulations of rubbish inside and outside the house, but repeated requests by the department for its removal and for permission to inspect the house proved unavailing. Early in the morning of July 24, 1969, an abatement order issued by an appropriate official of the fire department pursuant to G. L. c. 148, § 5 (as amended through St. 1962, c. 456),² was served upon the

¹ A contention by the respondent in the Land Court that the 1969 tax was improperly assessed is not argued in her brief on appeal, and we therefore do not consider it.

² "The marshal, the head of the fire department or any person to whom the marshal or the head of the fire department may delegate his authority in writing, may, and upon complaint of a person having an interest in any building or premises or property adjacent thereto, shall, at any reasonable hour, enter into buildings and upon premises, which term for the purposes of the remainder of this section shall include alleys adjacent thereto, within their jurisdiction and make an investigation as to the existence of conditions likely to cause fire. They shall, in writing, order such conditions to be remedied, and whenever such officers or persons find in any building or upon any premises any accumulation of combustible rubbish, including waste

respondent in hand. The order directed her to remove the rubbish by noon of the following day. After the deadline had passed, members of the fire department, having determined that no change had been effected in the property, broke into the house at about 3:15 P.M. on July 25, 1969. So far as appears on the present record, they did so purely on the strength of the abatement order and the provisions of G. L. c. 148, § 5, and not pursuant to a search warrant. They discovered "an enormous accumulation of rubbish" inside and outside the house, and, after attempting to preserve anything of value, had the premises cleared of combustible material by an independent contractor engaged by the department. The respondent was not allowed on the locus while the clearing operations were taking place except when accompanied by a member of the department. The contractor charged

paper, rags, cardboard, string, packing material, sawdust, shavings, sticks, waste leather or rubber, broken boxes or barrels or other refuse that is or may become dangerous as a fire menace or as an obstacle to easy ingress into or egress from such buildings or premises, they shall, in writing, order the same to be removed or such conditions to be remedied. Notice of such order shall be served upon the owner, occupant or his authorized agent by a member of the fire or police department. If said order is not complied with within twenty-four hours, the person making such order, or any person designated by him, may enter into such building or upon such premises and remove such rubbish or abate such condition at the expense of such owner or occupant. Any expense so incurred by or on behalf of the commonwealth or of any city or town, shall be a lien upon such building or premises, effective upon the filing in the proper registry of deeds of a claim thereof signed by such person and setting forth the amount for which the lien is claimed; and the lien shall be enforced within the time and in the manner provided for the collection of taxes upon real estate. Any such owner or occupant who fails or refuses to comply with said order shall be punished by a fine of not more than fifty dollars for each consecutive forty-eight hours during which such failure or refusal to comply continues."

\$11,927.15, and that amount was duly entered on the tax title account on May 8, 1970.

The judge found and ruled that the city had complied with G. L. c. 148, § 5 (see fn. 2), in all respects. The respondent does not question that determination or the amount of the charge made by the contractor. She contends, however, that the procedure followed by the fire department, though sanctioned by the terms of § 5, deprived her of rights guaranteed by the Constitution of the United States, and that the lien arising from that charge was therefore invalid. Specifically, she contends that the notice contained in the abatement order was so insufficient as to result in a deprivation of her property without due process of law in violation of the Fourteenth Amendment, and that the warrantless entry into her house and subsequent activities there by the fire department constituted an unreasonable search and seizure within the meaning of the Fourth Amendment, as made applicable to state action by the Fourteenth Amendment.

We are not persuaded that the notice served on the respondent was constitutionally insufficient in any of the three respects argued in her brief. One such argument is that she was incompetent and that notice requirements in the case of an incompetent person are more stringent than in other cases. While that argument is correct or supportable as an abstract proposition of constitutional law (*Covey v. Somers*, 351 U. S. 141, 145-147 [1956]; *Robinson v. Hanrahan*, 409 U. S. 38, 40 [1972]), it has no application here. Although the respondent was obviously eccentric, there was no showing that she was incompetent at the time she received the notice. Compare *Nelson v. New York City*, 352 U. S. 103, 108-109 (1956). Nor can we agree that the notice was constitutional defective in giving her so short a period of time to abate the con-

dition. She had ample warning before the order was served that the condition could not be permitted to continue, and in any event a person "owning a building in such shape had reasonable ground to expect that public authorities soon might require its prompt rehabilitation . . ." *DiMaggio v. Mystic Bldg. Wrecking Co. Inc.* 340 Mass. 686, 693 (1960). The respondent's argument that she was not given adequate warning of the high cost of the rubbish removal or of the likelihood of the loss of her home by reason thereof fails because there is no showing on this record that the amount of the charge, uncontested at the time it was assessed, was not commensurate with the quantity of rubbish on the premises and the work involved in removing it. Nor is there a showing that the authorities anticipated or had reason to anticipate at the time that the respondent would ultimately lose her home. For all that appears, the possibility of such an outcome became a probability only when the respondent failed to pay the charge many months later.

The entry into the respondent's apartment by the fire department officials without a search warrant raises issues of (1) the constitutionality of that procedure and (2) the effect of that entry on the enforceability of the item in the tax account arising from the cleanup of the rubbish.

The Supreme Court of the United States has made clear that an administrative inspector may enter private premises without consent only after obtaining a search warrant. *Camara v. Municipal Court*, 387 U. S. 523, 534 (1967). The court has recently "adhered" to *Camara* and its companion case, *See v. City of Seattle*, 387 U. S. 541 (1967). *Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp.* 416 U. S. 861, 864 (1974). In *Camara*

a housing inspector sought to enter the appellant's premises under the authority of a municipal ordinance that stated, "Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the city to perform any duty imposed upon them by the Municipal Code." *Camara, supra*, at 526. The court overruled *Frank v. Maryland*, 359 U. S. 360 (1959), and held that the appellant was entitled to a writ of prohibition against criminal prosecution for refusal to allow entry of the municipal inspector without a search warrant. It follows that pre-*Camara* cases applying the principle of *Frank v. Maryland* to uphold convictions based on warrantless administrative searches can no longer be treated as accurate statements of the law in this area. See e.g. *Commonwealth v. Hadley*, 351 Mass. 439 (1966), vacated and remanded 388 U. S. 464 (1967); *Commonwealth v. Dixon*, 352 Mass. 420, 423 (1967).

The present case does not fit within any exception to the warrant requirement for administrative searches. In *Camara* itself the court listed a number of "emergency situations" under which prompt inspections without a warrant would not constitute an unreasonable search in violation of the Fourth Amendment. 387 U.S. at 539. The listed examples included seizure of unwholesome food, compulsory smallpox vaccination, and summary destruction of tubercular cattle. *Ibid.* The court also indicated that warrants need not be obtained unless the property owner refused to give consent for the search. *Ibid.*³

³ Although the question of the availability of a warrant, if one had been sought, has not been raised in the present case, we note that a court may issue a warrant for an administrative search on a lesser showing of probable cause than in criminal cases. See *Camara*, 387 U. S. at 538-539.

The record in the present case will not support either a finding of consent or of the type of emergency situation suggested by the court in *Camara*. The fire department had received complaints about accumulations of rubbish on the respondent's property for seven years before undertaking the cleanup in 1969. The abatement order itself, following the requirements of G. L. c. 148, § 5, allowed twenty-four hours before the fire department could enter to clean up the premises. That waiting period belies any claim of exigency.⁴

The city's reliance on the exception to the warrant requirement for inspections of closely regulated businesses set out in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and in *United States v. Biswell*, 406 U.S. 311 (1972) does not bear on the search of and seizure from a private home in the present case.⁵

⁴ The lack of exigency distinguishes the present case from those in which warrantless entries were upheld in searches of premises during a fire or shortly thereafter to determine its cause. See *United States v. Green*, 474 F. 2d 1385, 1388-1389 (5th Cir. 1973), cert. den. 414 U. S. 829 (1973); *United States v. Gargotto*, 476 F. 2d 1009, 1010-1013 (6th Cir. 1973); *Steigler v. Anderson*, 496 F. 2d 793, 796-797 (3rd Cir. 1974), cert. den. 419 U.S. 1002 (1974).

⁵ In *Colonnade* the court suggested, and in *Biswell* it confirmed, that Congress could allow warrantless inspections of closely regulated industries. In *Almeida-Sanchez v. United States*, 413 U. S. 226 (1973), the court described *Colonnade* and *Biswell* in a manner that strongly suggests their inapplicability to an inspection of a private home, by stating, "A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Id.* at 271. Lower courts have further limited the *Colonnade-Biswell* exception to the warrant requirement for administrative searches by construing the inspections of business premises under the Occupational Safety

We hold that the entry onto the premises and inspection thereof constituted an illegal search. We must now consider the effect of this violation of constitutional rights under the Fourth Amendment on the item in the tax title account representing reimbursement to the city for its expenses in the cleanup of the accumulated rubbish on the respondent's property. We look first to the statutes governing the collection of such charges. General Laws c. 148, § 5, provides that such charges shall become a lien on the property "and the lien shall be enforced within the time and in the manner provided for the collection of taxes upon real estate." Compare *Worcester v. Hoffman*, 345 Mass. 647, 648 (1963).⁶

The nature of the relief sought by the respondent must be distinguished from the remedies usually applied for

and Health Act (OSHA), 29 U. S. C. 657(a) (1970) to require warrants. A very recent three-judge court decision, *Brennan v. Gibson's Products, Inc.* 407 F. Supp. 154, 157-163 (D. Tex. 1976), limited the *Colonnade* and *Biswell* exceptions to the warrant requirement to businesses more closely regulated than those within the almost universal reach of OSHA. Contrast *Brennan v. Buckeye Industries*, 374 F. Supp. 1350 (S.D. Ga. 1974).

⁶ General Laws c. 60, § 37, states, in part, "No . . . item included in a tax title account shall be held to be invalid by reason of any error or irregularity which is neither substantial nor misleading, whether such error or irregularity occurs . . . in the proceedings of any other official or officials charged with duties in connection with . . . the inclusion of such item in the tax title account." We do not regard it as having any applicability to these errors. See generally *Fall River v. Conanicut Mills*, 294 Mass. 98, 99-100 (1936); *Bartevian v. Cullen*, Mass. , (1976) (Mass. Adv. Sh. [1976] 593, 597-598).

The purpose of § 37 was to mitigate the severity of cases holding that the tax laws must be observed to the most minute particular before a tax lien could be enforced. *Fall River, supra*, at 99. As the constitutional violations here cannot be classified as insubstantial, we must determine whether they require the remedy of voiding this item in the tax title account.

violations of Fourth Amendment rights. The respondent does not argue that the warrantless entry was the source of evidence necessary to prove her obligation to the city which should have been suppressed by the application of an exclusionary rule but rather that the item in the tax title account arose from procedures that included the warrantless entry. The parties have not directed our attention to, and we have not found, any cases that determine the validity of a charge and lien therefor arising out of conduct that has been held to be in violation of rights protected by the Fourth Amendment which do not rely on an evidentiary exclusionary rule.⁷

The respondent might have brought an action against the fire department officials for compensatory damages resulting from the unlawful search and seizure.⁸ The re-

⁷ For cases which have considered the effect of Fourth Amendment violations on tax liens see fn. 10, *infra*.

We also distinguish the remedy afforded by *Camara*. The court in *Camara* concluded, "that appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection." 387 U. S. at 540.

We do not view this holding as necessarily requiring the remedy the appellant seeks. We view the *Camara* remedy as limited to a prohibition against criminal prosecution for the assertion of constitutional rights. The liability in the present case, unlike *Camara*, is compensatory only, and is not in any way a criminal penalty.

⁸ In the federal courts, such an action against state officials for invasion of privacy by an unlawful search and seizure may be brought pursuant to 42 U.S.C. § 1983 (1970). Compare *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Prior to the passage of G.L. c. 214, § 1B, as inserted by St. 1974, c. 193, § 1, the availability of compensatory damages for tortious invasion of privacy had not been established in Massachusetts, although the Supreme Judicial Court had indicated its willingness to consider such a possibility, "when and if we are confronted with some substantial, serious or inde-

spondent, thus, seeks a remedy additional to such a cause of action. Recent Supreme Court decisions have similarly characterized the exclusionary rule in criminal cases as a court-imposed remedy to control violations of Fourth Amendment rights by state officials. In this light we can examine cases that define the outer limits of the exclusionary rule. From these we derive a balancing test to use in determining whether the Fourth Amendment requires the remedy that the defendant seeks.

A full discussion of the remedial character of the exclusionary rule was provided by Mr. Justice Powell in *United States v. Calandra*, 414 U.S. 338 (1974). In that case, a witness before a grand jury sought to avoid responding to certain questions on the ground that they were based on information acquired by the government in the course of an illegal search and seizure. The court held that the exclusionary rule preventing the use of such evidence in a prosecution of someone who had standing to object to the search did not prevent such grand jury questioning. Justice Powell, writing for the majority, said, "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." 414 U.S. at 347-348. Justice Powell proceeded to define a balancing test for use in determining whether the exclusionary rule should apply to the use of evidence other than in the

cent intrusion upon the private life of another." *Frick v. Boyd*, 350 Mass. 259, 264 (1966). See *Commonwealth v. Wiseman*, 356 Mass. 251, 258 (1969).

prosecution of the case-in-chief against the victim of the search and seizure. Following the analogy set out above, we believe that balancing test should be used to determine whether a remedy other than a cause of action for the invasion of privacy must be afforded to the respondent here.

Justice Powell offered the standing requirement of *Brown v. United States*, 411 U.S. 223 (1973), and *Alderman v. United States*, 394 U.S. 165 (1969), as an example of the balancing process. 414 U.S. at 338. He wrote, "Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. [Citations omitted]. This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *Ibid.*

Thus, in determining whether to apply the exclusionary rule in grand jury proceedings, Justice Powell weighed the damage that would be done to the historic investigative role of the grand jury by the introduction of disruptive litigation of exclusionary rule challenges, against the potential benefits of further deterrence of illegal police conduct. In light of the availability of the exclusionary rule in the case-in-chief, the court "decline[d] to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury," *id.* at 351-352, and to extend the exclusionary rule to grand jury questioning.

Of the cases that have employed the balancing test described in *Calandra*, the one we find most helpful pre-

ceded *Calandra* but correctly foresaw the analysis the court adopted. Although the suppression of evidence was at issue in the Oregon Supreme Court's opinion in *State Forester v. Umpqua River Navigation Co.* 258 Ore. 10 (1971), cert. den. 404 U.S. 826 (1971), we examine it for its holding that no remedy other than a cause of action for invasion of privacy was required by the alleged Fourth Amendment violations. The factual similarities to the present case make this holding especially relevant to the determination of the need for an additional remedy here.

The state forester brought a civil action to collect for costs incurred in fighting a forest fire it claimed resulted from sparks thrown off by Umpqua's earthmoving equipment. Umpqua argued that a nonconsensual inspection of some of its machinery constituted an unreasonable search and seizure. While the court expressed its doubts that the inspection of machinery left out in a field represented an illegal search and seizure ("if an enclave of privacy is what is protected by the Fourth Amendment, we have doubt whether any enclave of privacy was penetrated in this case," 258 Ore. at 14), it held that even assuming the search and seizure were illegal, no exclusionary rule need be applied.

In its review of prior cases, the Oregon Court correctly foresaw *Calandra* by emphasizing the principle of deterrence as a justification for the exclusionary rule announced for state criminal cases in *Mapp v. Ohio*, 367 U.S. 643 (1961). The court then examined the type of investigation in the case at hand. It described it as not an investigation aimed at suspected criminal conduct, but only as an attempt to determine the cause of a fire. It noted that there was no known pattern of illegal searches and seizures in such fire investigations, whereas in *Mapp*, 367 U.S. at 656, the court referred to the need to deter

illegal searches and seizures in criminal investigations. The court pointed to the potential civil liability for invasion of privacy of state officials who engaged in illegal searches and seizures. It suggested that victims of illegal searches and seizures conducted in conjunction with civil investigations would find it far easier to establish civil liability than would criminals seeking similar relief for wrongs suffered during criminal investigations. The court also suggested that the victims of such civil searches and seizures might be able to complain more effectively to administrative officials who could bring the offending officials into line. 258 Ore. at 23-26. The court concluded, "[W]e do not find that illegal searches and seizures outside the area of law enforcement officers investigating crimes occur frequently. In addition, we have not been shown, if such were the practice, that remedies other than exclusion of evidence would be inadequate to deter the continuance of such practice. On the other side of the ledger, we continue to regard a trial as a search for the truth and, therefore, competent evidence should never be excluded except for the most compelling reason." *Id.* at 26.⁹

⁹ Examples of other cases applying the *Calandra* test include *Honeycutt v. Aetna Ins. Co.* 510 F. 2d 340 (7th Cir. 1975), cert. den. 421 U.S. 1011 (1975), and *United States v. Rushlow*, 385 F. Supp. 795 (S.D. Cal. 1974). In *Honeycutt*, the defendant insurance company introduced evidence obtained by a fire marshal in a warrantless search in a civil action on a fire insurance policy. The court agreed that the warrantless inspection was within the proscription of *Camara* and thus unconstitutional but held that the exclusionary rule need not be applied. The court concluded, "Holding that the exclusionary rule is inapplicable to grand jury proceedings where, of course, the government is a party seems to establish a fortiori its inapplicability to civil actions between private parties, and especially so when, after the most thorough consideration, every reason asserted for the ap-

Although a number of cases consider the effect of Fourth Amendment violations on tax liens, we find them of less assistance than *State Forester* because of their reliance on the exclusionary rule without reference to the *Calandra* balancing test.¹⁰

We must then evaluate the benefit and harm that would be created by allowing the remedy of barring the city
plicability of the rule to civil actions is held to be insufficient." *Id.* at 348.

Similarly, it was held in *Rushlow*, adhering to the balancing test of *Calandra*, that the exclusionary rule is not available in probation revocation hearings. The court suggested that such an extension of the exclusionary rule would severely impede probation revocation hearings and, again, that little additional deterrent would be afforded, since evidence illegally seized could be suppressed in a subsequent criminal trial for the conduct which was the subject of the probation revocation hearing. *Id.* at 797. We cite *Rushlow* solely for its application of the balancing test and not for its result.

¹⁰ See, e.g. *Pizzarello v. United States*, 408 F. 2d 579 (2d Cir. 1969); *United States v. Janis*, 31 Am. Fed. Tax R. 2d 73-1049 (1973) aff'd mem. No. 73-2226 (9th Cir. July 22, 1974), cert. granted 421 U.S. 1010 (1975) (tax liens voided where based substantially on evidence obtained in illegal search and seizure). Contrast, *Welsh v. United States*, 220 F. 200 (D.C. Cir. 1955); *Field v. United States*, 263 F. 2d 758 (5th Cir. 1959), cert. den. 360 U.S. 918 (1959); *Yannicelli v. Nash*, 354 F. Supp. 143 (D. N.J. 1973); *White v. United States*, 363 F. Supp. 31 (N.D. Ill. 1973).

The Tax Court has stated that evidence obtained in an illegal search and seizure is inadmissible in civil tax cases. *Elfrain T. Suarez*, 58 T.C. 792, 806 (1972) (income tax liability of doctor subject to warrantless search on suspicion of performing abortions).

The *Calandra* balancing test, not considered in the above-cited cases, or in the District Court opinion in *Janis*, has been raised by the Government in its brief before the Supreme Court in *Janis*. The Government suggests, "the inapplicability of the deterrence theory is especially evident here, since it is wholly unrealistic to assume that local police officers would be deterred from illegal searches and seizures because a possible federal civil tax liability might be rendered uncollectable." Brief at 10-11.

from recovering the cleanup costs. The principal benefit is the potential deterrent effect of such a remedy. We find the Oregon Supreme Court's observations in *State Forester* persuasive here. Our attention has not been directed to any pattern of illegal entries by fire officials in the exercise of their duties under G. L. c. 148, § 5. We have every reason to believe that the effect of our holding, that a nonconsensual search pursuant to that section in other than exigent circumstances requires a search warrant, will be that fire officials will in the future procure such warrants. As the Oregon Supreme Court suggested, civil plaintiffs not accused of a crime may be able to pursue such remedies with greater likelihood of success than those accused or convicted of crimes, and the potential of such suits may have some deterrent effect on potential violations of Fourth Amendment rights. We note, however, that in the present case no alternative remedy to the cause of action for invasion of privacy is available for deterrent effect. In this way, the case differs from *Calandra* and *Rushlow*, where a potential alternative was the exclusion of the illegally-seized evidence in the main criminal proceedings and that was considered to carry out a sufficient deterrent function.

On the other side of the balance, we must consider the harm to the city that would result from the voiding of this item in the tax title account. Requiring the city to bear the \$11,927.15 cleanup cost without any compensating rights to equity in the building that is subject to the lien for that charge would result in a windfall to the respondent. The respondent had a statutory obligation to maintain her premises free of fire hazards or bear the cost of cleaning them up.

Compared with the harm which would result to the city, we find that the benefits of granting the requested relief

are minimal as it appears that city officials are unlikely to engage in such illegal conduct in the future and civil actions for damages are available to deter that conduct. Thus, we hold that the Fourth Amendment does not require voiding this item.

THE CHARGE FOR REPAIRING AND BOARDING UP THE HOUSE

With regard to the charge for repairing and boarding up the house on the locus after it had been largely destroyed by fire, the judge made findings to the following effect. After the premises had been cleaned in 1969, as described in the previous section of this opinion, the respondent appears to have lived in a car at the rear of the house and continued to use the house for such purposes as keeping a varying number of dogs. After the fire, which occurred in June, 1971, she was ordered by the city's building commissioner pursuant to St. 1938, c. 479, § 116(d),¹¹ to board the house up and repair its roof in order to make it safe. She apparently did nothing in response to that order, and the building commissioner engaged a contractor to perform the necessary work on an emergency basis for \$7,880. The work was completed on March 8, 1972, and she was billed for the cost thereof on

¹¹ "Every building . . . which is dangerous or unsafe shall be made safe or removed; or every such building shall be vacated forthwith on order of the commissioner, with the approval of the mayor. Such order shall be in writing and shall be addressed and delivered, or mailed, postage prepaid, to the owner or tenant, if he is known and can be found, or otherwise by posting an attested copy of the order in a conspicuous place upon an external wall of the building, and shall state the conditions under which the building may again be used or occupied . . . If in the opinion of the commissioner the public safety so requires the commissioner, with the approval of the mayor, may at once enter the building or other structure which he finds unsafe or dangerous, or land on which it stands . . . with such assistance as he may require, and make safe or remove said unsafe or dangerous building or other structure . . ."

April 14 of that year in accordance with St. 1938, c. 479, § 116(e), whereunder such expenses constitute a debt to the city and a lien upon the premises.

The judge noted that the respondent had a right to appeal the order of the building commissioner to a statutory board of appeal under St. 1938, c. 479, § 118(a), and a right to judicial review of any decision by the board under § 119(f) of the same chapter, but that she did not avail herself of these remedies. He also pointed out that she failed to seek timely judicial review of the lien arising from this charge, as was her right under St. 1938, c. 479, § 116(f).¹² The judge ruled that the appellant's failure to pursue those statutory remedies precluded her collateral attack on this charge in the present foreclosure proceeding.

The ruling was correct. Compare *DiMaggio v. Mystic Bldg. Wrecking Co. Inc.* 340 Mass. at 692. The respondent's contention to the contrary is based entirely on the assertion that the city, rather than she, was in possession and control of the locus at the time, and therefore had no right to impose the charge upon her. Apart from being based on a highly questionable view of the facts, the contention cannot (and does not purport to) account for or excuse her failure to litigate the matter at the proper time and in the proper forum. The charge must therefore stand.

Decree affirmed.

¹² "The owner of the real estate to which a lien has attached, as provided in paragraph (e) within ninety days after the statement of said lien was filed in the registry of deeds or with said assistant recorder, as the case may be, may appeal to the municipal court of the city of Boston, which shall hear and determine after a hearing whether the amount of the claim is more than the amount actually expended to make safe or remove the building or structure, if amount is more, said court may reduce the amount of the claim to the amount so actually expended."

Appendix D.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH

At Boston,

June 29, 1976

ORDER

It is hereby ORDERED, that the following Applications for Further Appellate Review be denied:

M-513 TOWN OF MILFORD v. QUINCY QUARIES COMPANY
(Land Court No. 61850; Appeals Court No. 75-374)

M-514 LOUIS M. CANTER, et al v. PLANNING BOARD OF
WESTBORO

(Worcester Superior No. EQ 5691; Appeals Court
No. 75-262)

M-515 LEONOR LOBAO, et al v. COMMONWEALTH
(Essex Superior No. 144671; Appeals Court No.
75-320)

M-521 COMMONWEALTH v. DOROTHY MONTERIBIO
(Suffolk Superior Criminal No. 84384; Appeals
Court No. 75-132)

M-522 SALVATORE RAIA v. PETER E. SKERRETT, et al
(Middlesex Superior No. 35648; Appeals Court
No. 75-412)

M-523 ANNA F. DITSON, TRUSTEE v. CITY OF BOSTON
(Land Court No. 47283; Appeals Court No. 74-542)

M-525 HARRY WOLK, Trustee, et al v. EDMUND LAURIE, et al
(Norfolk Superior No. 114071; Appeals Court No.
75-702)

By the Court,
/s/ Frederick J. Quinlan
Frederick J. Quinlan
Clerk

June 29, 1976

Appendix E.

COMMONWEALTH OF MASSACHUSETTS
LAND COURT

CASE No. 47283

FINAL DECREE IN TAX LIEN CASE

City of Boston

vs.

Anna F. Ditson, Trustee and
Anna F. Ditson, Individually

DECREE

This case came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it is

ORDERED, ADJUDGED AND DECREED that all rights of redemption are forever foreclosed and barred under the deed given by the Collector of Taxes for the City of Boston in the County of Suffolk and said Commonwealth, dated May 7, 1970 and duly recorded in Book 8362, Page 454.

By the Court. (RANDALL, J.)

Attest:

/s/ Margaret M. Daly

Recorder

Dated July 26, 1976

Appendix F.

A—276

In the Land Court of the Commonwealth of Massachusetts

Case No. 74-542

Anna F. Ditson, Trustee,
Appellant

v.

City of Boston,
Appellee

**NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES**

I. Notice is hereby given that Anna F. Ditson, Trustee, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered in this action on June 29, 1976 denying a Petition for Further Appellate Review of the Appeals Court decision sustaining the Land Court decree foreclosing the appellants' right of redemption.

This appeal is taken pursuant to 28 U.S.C. 1257(2).
II. The clerk will please prepare a transcript of the record in this cause for transmission to the clerk of the Supreme Court of the United States and include in said transcript the following:—

Decision of the Land Court

Decision of the Appeals Court

All docket entries

III. The following questions are presented by this appeal:—

1. Whether the lien for expenses incurred by the city in the removal of personal property from Mrs. Ditson's home was valid although the entry into the dwelling and the inspection thereof constituted an illegal search and whether the assessment made for the rubbish removal was so tainted by the illegal entry that it vitiated in its entirety the tax lien account of which it was the major item.

2. Whether the abatement notice served upon Anna F. Ditson, Trustee, denied her due process of law in that (1) such notice did not give a reasonable period of time within which to abate the described condition, (2) such notice, while indicating a fine for failure to take action, did not inform Anna F. Ditson, Trustee, that the city would forcibly remove such accumulations from her house without any prior judicial review or warrant, and (3) such notice was insufficient to adequately warn her of the nature of the proceedings, the city having prior knowledge of her mental limitations.

/s/ Douglas A. Randall
 Douglas A. Randall
 Attorney for Anna F. Ditson, Trustee
 1372 Hancock Street
 Quincy, Massachusetts 02169
 Tel. (617) 472-8870

PROOF OF SERVICE

I, Douglas E. Franklin, an attorney in the office of Douglas A. Randall, attorney of record for Anna F. Ditson, Tr., appellant herein, depose and say that on the 27th day of September, 1976, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United

States on the City of Boston, appellee herein, by delivering the same to Mr. Mack Greenberg in the offices of the Law Department of the City of Boston, counsel of record for said City of Boston, located at One City Hall Plaza, Boston, Massachusetts.

/s/ Douglas E. Franklin
 Douglas E. Franklin

Subscribed and sworn to before me, at Boston, this 27th day of September, 1976.

/s/ Mary P. Kelly
 Notary Public
 My commission expires Feb. 23, 1979

DEC 22 1976

MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1976

—
No. 76-740
—

ANNA F. DITSON, TRUSTEE,
Appellant.

v.

CITY OF BOSTON,
Appellee.

—
**APPELLEE'S BRIEF IN SUPPORT OF ITS MOTION
TO DISMISS APPEAL**

—
MACK K. GREENBERG,
Assistant Corporation Counsel

City of Boston Law Department
Room 615, City Hall, 02201
725-4026

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In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-740

**ANNA F. DITSON, TRUSTEE,
*Appellant,***

v.

**CITY OF BOSTON,
*Appellee.***

**APPELLEE'S BRIEF IN SUPPORT OF ITS MOTION
 TO DISMISS APPEAL**

MOTION TO DISMISS APPEAL

Appellee moves this Court to dismiss the appeal herein sought on the following grounds:

- I. The Appellant has distorted the facts.
- II. The appeal was not taken in conformity to Rules 16(1) (a) and 34(2) of the Supreme Court Rules.
- III. The appeal presents no substantial federal question.
- IV. The judgment of the Court below rests on an adequate non-federal basis.

/s/ Mack K. Greenberg

Mack K. Greenberg
 Attorney for Appellee, City
 of Boston
 City Hall, Room 615
 Boston, Mass. 02201

QUESTIONS PRESENTED

The questions presented for review are contained in Appellee's Motion to Dismiss.

Statutory Provisions Involved

Mass. Gen. Laws c.59, §11

"Taxes on real estate shall be assessed in the town where it lies, to the person who is the owner on January first, and the person appearing of record, in the records of the county, . . . where the estate lies, as owner on January first, . . . shall be held to be the true owner thereof; . . ."

* * * *

Mass. Gen. Laws c.60, §54

"The instrument of taking shall be under the hand and seal of the collector, and shall contain a statement of the cause of taking, a substantially accurate description of each parcel of land taken, the name of the person to whom the same was assessed, the amount of the tax thereon, and the incidental expenses and cost to the date of taking. Such an instrument of taking shall not be valid unless recorded within sixty days of the date of taking. If so recorded it shall be *prima facie* evidence of all facts essential to the validity of the title so taken, whether the taking was made on or before as well as since July first, nineteen hundred and fifteen. Title to the land so taken shall thereupon vest in the town, subject to the right of redemption. Such title shall, until redemption or until the right of redemption is foreclosed as hereinafter provided, be held as security for the repayment of said taxes with all intervening costs, terms imposed for redemption and charges, with interest thereon, . . ."

Mass. Gen. Laws c.60, § 61

"Whenever a town shall have purchased or taken real estate for payment of taxes the lien of the town on such real estate for all taxes assessed subsequently to the assessment for payment of which the estate was purchased or taken shall continue, and it shall be unnecessary for the town to take or sell said real estate for non-payment of said subsequent taxes, costs and interest; and on redemption from such taking or purchase, said subsequent taxes, costs and interest shall be paid to the town, and the payment shall be made a part of the terms of redemption. . . ."

* * * *

BRIEF AND ARGUMENT

[all references to appendices refer to those set out in Appellant's jurisdictional statement]

I. THE APPELLANT HAS DISTORTED THE FACTS.

As will hereinafter appear, Appellant's staccato recital of what she terms the relevant facts, is taken out of context and hence does an injustice to the findings of the Land Court Judge (Appendix B, pp. 19-35) and of the Appeals Court (Appendix C, pp. 36-52).

a)Appellant states at page 6 of her jurisdictional statement that an independent contractor retained by the City (Appellee) spent three weeks removing her personal property and papers, and that she was not allowed on the premises while the cleaning operations were taking place except when accompanied by a member of the department.

Standing alone those assertions, if left unchallenged, may be construed as a silent condemnation of the Appellee for excluding the Appellant from her home while its representative combed her personal possessions. The findings of the Land Court Judge describing the enormous quantities of debris in and about the premises place a different gloss on

the scene both as to why the Appellant was not permitted to enter the premises and as to the nature of the material that was removed. (Appendix B. pp. 27,30).

A series of photographs showing the exterior as well as the interior of the premises was received in evidence. They are not included or referred to in the jurisdictional statement. Since the Appellant has not requested the record to be certified to this Court, Appellee, pursuant to Rule 12 of the Supreme Court Rules has requested that the entire record, including the photographs, be certified and transmitted to this Court. When so transmitted the photographs will show an incredible collection of debris, rubbish, dog and cat litter and the like, filling the stairwells and hallways as well as the rooms. Living in a car parked in the back yard as found by the Land Court Judge (Appendix B, p.30) becomes more understandable.

b) Appellant states at page 7 of her jurisdictional statement that although she was not allowed on the property she continued to be taxed for the years 1970, 1971 and 1972.

According to the findings of the Land Court Judge at page 31 of Appendix B;

"After the premises at 171 Marlborough Street had been cleaned up in the summer of 1969, Mrs. Ditson apparently lived in the car in the rear of the premises and occupied the premises if not for living purposes then for other reasons, among them as a place of abode for a varying number of dogs. Accumulations of debris again appeared in the rear of the premises and there was evidence from the neighbors that some of this material found its way into the building."

"Sometime in May 1971, . . . she was living in and about the automobile in the rear of 171 Marlborough Street."

Thus the statement by the Appellant that she was taxed for the years 1971 and 1972 although she was not allowed on the premises does not comport with the facts. Moreover,

in Massachusetts as in substantially all other states, ownership and not occupancy is the basis for real estate tax liability. See Mass. Gen. Laws c.59 §11. According to the findings of the Land Court Judge the Appellant became the owner in 1949 and that the property was properly assessed to her for the years 1969 through 1972 (Appendix B p. 26).

c) Appellant's jurisdictional statement at page 7 states as follows:

"On October 20, 1976, the City of Boston, after having received notice of Mrs. Ditson's appeal to the United States Supreme Court, sold her home located at 171 Marlborough Street, Boston at public auction to the highest bidder for \$40,000 plus pro rata taxes of \$8,000."

Clearly the above statement is not part of the record. Notwithstanding, it requires amplification. After the Supreme Judicial Court had denied the Appellant's request for further review, a Foreclosure Decree issued. (Appendix E). By its very terms it confirmed the City's tax taking dated May 7, 1970 based on unpaid 1969 real estate taxes (Appendix B, pp.24-26). The Foreclosure Decree also barred all rights of redemption, thereby enabling the Appellee to dispose of the property by public auction. In due course those in charge of the City's foreclosed real estate advertised the premises for sale at a public auction to be held on the premises at 9:30 A.M., October 20, 1976. Some 42 hours before the time set for the sale, and unknown to the Appellee including those in charge of foreclosed real estate, the Appellant caused to be recorded in the Registry of Deeds for Suffolk County a lis pendens based on this appeal. Other than recording the document, no effort was made to serve the auctioneer or anyone else in the City with a copy thereof. It was not until several days following the sale that Appellee received in the mail a bare copy of the document. Therefore, Appellant's recital to the effect that the Appellee sold the property at public auction after having received

notice of the lis pendens is a distortion of the facts. Since the lis pendens was recorded without prior notice to the Appellee, it violates the Fourteenth Amendment to the Constitution by depriving the owner of a significant property interest without being given the opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). *Schneider v. Margossian* 349 F. Supp. 742 (D.Mass. 1972), declaring unconstitutional the Massachusetts Trustee Process Statute. *Bay State Harness Horse Racing and Breeding Association v. PPG Industries, Inc.*, 365 F. Supp. 1299 (D.Mass. 1973), declaring unconstitutional the Massachusetts Statutes permitting real estate attachments.

[The purchaser at the foreclosure sale has now moved to intervene and have the Land Court Judge order the lis pendens discharged].

Since the Appellant has seen fit to go outside the record, the Appellee considers it appropriate to bring to the attention of this Court that while this case was decided on the assumption that no warrant had been obtained prior to the entry, in fact, a search warrant was obtained and used when the premises were entered. When the existence of the Warrant was first discovered the case was pending in the Appeals Court. Appellant, claiming excusable neglect, moved to expand the record in the interest of justice, by including the search warrant and its accompanying documents. The motion was vigorously opposed by the Appellant. The Land Court Judge to whom the matter was referred, denied the motion. As a consequence, competent evidence of the search warrant that would have mooted this appeal as well as the appeals below was kept from the record.

II. THE APPEAL WAS NOT TAKEN IN CONFORMITY TO RULES 16 (1) (a) and 34(2) OF THE SUPREME COURT RULES.

Appellant admits at page 2 of her jurisdictional statement to the following dates:

- June 3, 1974 - Land Court entered a decree foreclosing Appellant's right of redemption of her property.
- May 28, 1976 - Appeals Court affirmed decree of Land Court.
- June 29, 1976 - Supreme Judicial Court denied Petition for Further Appellate Review.
- Sept. 27, 1976 - [the ninetieth day] Notice of Appeal to U.S. filed in Land Court.

Appellant's jurisdictional statement does not disclose the date of her request to extend the time for docketing her appeal. However, the certificate of service attached to the copy of Appellant's request, shows that the request was dated October 1, 1976.

While Rule 13 of the Supreme Court Rules permits an application for extension of time within which to docket an appeal, Rule 34(2) of the Supreme Court Rules requires that the application seeking such extension be presented to the clerk *within* the period sought to be extended. (underscoring supplied). Obviously, more than 90 days had elapsed and the appeal therefore was not filed within the time allowed by law.

Certainly, on reflection, the need for counsel, who in this case is the appointed Guardian Ad Litem, to find his client for the purpose of effecting the appeal when she could have no possible input into the legal documentation necessary for that appeal, is not the good cause necessary to warrant departure from the rule.

III. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

1. Appellant has not been denied due process.

Appellant's contention that she was denied due process is without merit. As bearing on this issue, Appellant, at page 6 of her jurisdictional statement, questions the validity of the abatement notice that was served on her pursuant to the provisions of Mass. Gen. Laws c.148, § 5, which statute is quoted verbatim at pages 4 and 5 of her jurisdictional statement.

Her arguments appearing on pages 11 and 12 of her jurisdictional statement were presented first to the Appeals Court and later, to the Supreme Judicial Court in support of her request for Further Appellate Review. In disposing of the due process issue the Appeals Court stated:

"We are not persuaded that the notice served on the respondent was constitutionally insufficient in any of the three respects argued in her brief. One such argument is that she was incompetent and that notice requirements in the case of an incompetent person are more stringent than in other cases. While that argument is correct or supportable as an abstract proposition of constitutional law (*Covey v. Somers*, 351 U.S. 141, 145-147 [1956]; *Robinson v. Hanrahan*, 409 U.S. 38, 40 [1972]), it has no application here. Although the respondent was obviously eccentric, there was no showing that she was incompetent at the time she received the notice. Compare *Nelson v. New York City*, 352 U.S. 103, 108-109 (1956). Nor can we agree that the notice was constitutionally defective in giving her so short a period of time to abate the condition. She had ample warning before the order was served that the condition could not be permitted to continue and in any event a person "owning a building in such shape had reasonable ground to expect that public authorities soon might require its prompt rehabilitation . . ." *DiMaggio v. Mystic Bld. Wrecking Co. Inc.* 340 Mass. 686, 693 (1960). The respondent's argument that she was not given adequate

warning of the high cost of the rubbish removal or of the likelihood of the loss of her home by reason thereof fails because there is no showing on this record that the amount of the charge, uncontested at the time it was assessed, was not commensurate with the quantity of rubbish on the premises and the work involved in removing it. Nor is there a showing that the authorities anticipated or had reason to anticipate at the time that the respondent would ultimately lose her home. For all that appears, the possibility of such an outcome became a probability only when the respondent failed to pay the charge many months later." (Appendix pp. 39-40)

2. The illegal entry does not preclude the assessment of the rubbish removal charge as a part of the tax lien.

Appellant's contention that the rubbish removal charge should be voided as a part of the tax lien through some convoluted application of the exclusionary rule is not supported by the prevailing law or the facts of this case. Use of the exclusionary rule has traditionally been confined to situations where the government seeks to use illegally seized evidence to incriminate the victim of the unlawful search. *United States v. Calandra*, 414 U.S. 338, 348, 38 L. Ed. 2d 561, 94 S. Ct. 613 (1974). For the exclusionary rule to be applied in this civil proceeding would require an unprecedented extension of the rule which, as the Appeals Court below pointed out, is neither necessary, appropriate nor desirable.

As was stated in *Calandra*, the exclusionary "rule's prime purpose is to deter future unlawful police conduct . . . [T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." 414 U.S. at 347-348.

The Appeals Court below after applying the *Calandra* balancing test concluded that there existed no pattern of illegal entry by fire department officials and that no such pattern

could be presumed in the future. The Court found that substantial harm would result to the City if the rubbish removal charge was voided from the tax title account. (Appendix C, p. 50).

State Forester v. Umpqua River Navigation Company, 258 Ore. 10 (1971), cert. denied, 404 U.S. 826 (1971), presents an analogous situation in that it involved a civil proceeding. There an action was brought to collect for costs incurred in fighting a forest fire resulting from sparks thrown off by defendant's earthmoving equipment.

The Oregon Supreme Court held that despite an illegal search and seizure by non-law enforcement officials, the exclusionary rule was inapplicable and did not render evidence obtained from the illegal search inadmissible. Although decided prior to *Calandra*, the court in *State Forester* correctly foresaw and applied the analysis the Court subsequently adopted in *Calandra*. See too *Honeycutt v. Aetna Ins. Co.*, 510 F. 2d 340 (7th Cir.), cert. denied, 421 U.S. 1011 (1975), where the Court after applying the *Calandra* test, held that in civil cases the Fourth and Fourteenth Amendments do not require that the exclusionary rule be extended to situations where private parties seek to introduce evidence obtained through illegal searches made by state officials.

In light of all the foregoing, it appears that the exclusionary rule should not be extended to a civil proceeding of this nature. However, even if the Court found itself inclined to extend the exclusionary rule to civil proceedings, the instant case is an inappropriate vehicle for such an extension. The Appellant could have brought an action against the fire department officers for compensatory damages resulting from the unlawful entry. Although Appellant claims at pages 15 and 16 of her Jurisdictional statement that such a remedy was not available to her, the Appeals Court below draws attention to 42 U.S.C. § 1983 which does provide for an action against state

officials for invasion of privacy by an unlawful search and seizure. (Appendix C, p. 44).

As stated in *Lawrence v. State Tax Commission*, 286 U.S. 276, 282, 76 L. Ed. 1102, 52, S. Ct. 32 (1932):

"But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected *when such judicial action is properly invoked.*" (emphasis supplied.)

IV. THE JUDGMENT OF THE COURT BELOW RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

Appellant admits at page 7 of the jurisdictional statement that her property had been taken by the City of Boston for non-payment of the 1969 real estate taxes assessed thereon, together with the sewer and water charges and interest, by an instrument of taking recorded on May 7, 1970. This instrument of taking is the basis for the Foreclosure Decree (Appendix E, p.54). When the property of the Appellant was so taken (and there is no contest as to that aspect) title thereto vested in the City. See Mass. Gen. Laws c. 60, § 54; *Johnson v. McMahon*, 344 Mass. 348 (1962); *West v. Board of Selectmen of Yarmouth*, 345 Mass. 547 (1963). Appellee's title was subject to the right of redemption until such right was foreclosed by decree of the Land Court.

The tax taking by the City having been made, the method of foreclosing all rights of redemption lies within the Legislative discretion. *Napier v. Springfield*, 304 Mass. 175, (1939). The Land Court Decree (Appendix E. p. 54) has resulted in foreclosing all rights of redemption of the Appellant as well as other parties in interest. That decree does not address itself to the amount of the unpaid taxes due at the time of the taking or added subsequently by way of certification to the tax title account as permitted by Mass. Gen. Laws c.60, § 61, and c.148, § 5, quoted in the jurisdictional statement at pages 4 and

5. The fact that in 1972 all but one dollar of the 1969 tax was paid did not destroy the City's tax lien. (See decision of Land Court Judge, Appendix B, pp. 25, 30, 32) for dates subsequent charges were added to the tax account. Assuming arguendo that the rubbish removal charges were tainted, the City's tax lien for prior and subsequent unrelated charges is not thereby defeated. The pre-existing lien, based on unpaid 1969 taxes as a separate and distinct charge, supports the judgment of the Court below.

CONCLUSION

For the foregoing reasons, the appeal should be denied.

Respectfully submitted,

**City of Boston
By its Attorney**

**Mack K. Greenberg
Assistant Corporation Counsel**

**On the Brief
Ian Sherman
Legal Intern
December, 1976**